

THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TIG INSURANCE COMPANY,

Plaintiff,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF
COWLITZ COUNTY, WASHINGTON, a
Washington municipal corporation,

Defendant.

NO. C04-05052RBL

TIG'S RESPONSE TO PUD'S
MOTION TO LIFT STAY & ISSUE
SCHEDULING ORDER

Noted for:

November 28, 2008

I. INTRODUCTION

TIG Insurance Company ("TIG") does not, as a general proposition, oppose the PUD's motion to lift the stay entered by this Court on September 21, 2007. TIG respectfully submits, however, that prior to lifting the stay and before issuance of a scheduling order, the Court should direct the parties to confer and to submit a joint status report stating their position with respect to a trial date, amendment of the pleadings, discovery and motion schedule, and compliance with LR 39.1. Such a joint status report will serve to inform the Court regarding the scope and complexity of the remaining issues, and will facilitate the Court's formulation of an appropriate scheduling order governing the litigation of remaining claims.

1 TIG has proposed to PUD that the parties seek leave to submit a joint status report
 2 before entry of a scheduling order and circulated its draft of such a report to PUD's counsel in
 3 hopes that TIG's draft could serve as the basis for a joint report. PUD's counsel declined to
 4 participate in the preparation of a joint status report at this time, however, taking the position
 5 instead that a joint status report will be unnecessary unless and until the Court asks the parties
 6 to prepare one. Respectfully, TIG continues to believe that, given the potential scope and
 7 complexity of this litigation, the minimal time that would be involved in preparing a joint status
 8 report for the Court's review, in advance of any lifting of the stay, would be time well spent
 9 and will be beneficial to an efficient disposition of the case.

10 II. BACKGROUND

11 As summarized in its motion, PUD's counterclaims for alleged bad faith and violation
 12 of the Washington Consumer Protection Act (hereinafter "extra-contractual claims")¹ were
 13 initially bifurcated and stayed pending resolution of the underlying coverage questions.
 14 Thereafter, in compliance with the Court's direction to file all remaining dispositive motions,
 15 TIG filed a motion to lift the stay and sought summary judgment with respect to the extra-
 16 contractual claims. PUD opposed summary judgment as "premature," because it "ha[d] not
 17 had any opportunity to take discovery on these issues." Doc. No. 275 at 4 (emphasis in
 18 original). By minute order dated June 14, 2007, the Court denied TIG's motion without
 19 prejudice. Doc. No. 282

20 ¹ The PUD has also given notice of its intent to pursue a claim under the Washington Insurance Fair Conduct Act
 21 (IFCA), RCW 48.30.015. IFCA became effective December 6, 2007 and has been held not to apply retroactively
 22 to conduct occurring prior to its effective date. *Malbco Holdings, LLC v. AMCO Ins. Co.*, 546 F.Supp.2d 1130
 23 (E.D.Wash. 2008); *AECON Buildings v. Zurich N. America*, 2008 WL 895978 (W.D. Wash. 2008); *HSS*
Enterprises, LLC v. AMCO Ins. Co., 2008 WL 312695 (W.D. Wash. 2008). TIG therefore believes that IFCA
 will have no applicability in the instant matter. In order to quickly resolve the issue of IFCA retroactivity or any
 other issues arising from this or other new claims PUD may intend to assert, TIG respectfully submits that the
 Court should include in the case schedule a near-term deadline for motions seeking leave to amend pleadings.

1 On July 19, 2007, the Court entered a Scheduling Order that set a 15-month schedule
 2 for the completion of discovery, dispositive motions, and other tasks that would be involved in
 3 the litigation of the extra-contractual claims, with trial set for October 6, 2008. This schedule
 4 was ultimately rendered moot on September 21, 2007, when the Court vacated the scheduling
 5 order and again stayed the extra-contractual claims pending the conclusion of appellate
 6 proceedings in the Ninth Circuit with respect to contractual issues. Doc. Nos. 335, 338.

7 The Ninth Circuit proceedings with respect to contractual issues are now complete, with
 8 the Ninth Circuit having issued its mandate on November 12, 2008, and therefore it is
 9 procedurally appropriate to lift the stay. The important issues, which PUD's motion does not
 10 address, are: (1) the pre-trial schedule; and (2) the elements of the case schedule necessary to
 11 efficiently manage the case. We comment on these questions below.

12 **III. ISSUES TO BE ADDRESSED IN JOINT STATUS REPORT**

13 Due to the stay that was entered by the Court shortly following entry of the July 2007
 14 scheduling order, the discovery and other tasks contemplated by that original 15-month
 15 schedule remain to be done. TIG submits that a comparable schedule remains appropriate. In
 16 addition, TIG believes that the following issues should be addressed in any joint status report
 17 and subsequent scheduling order:

18 **1. Trial Date.** TIG believes that, consistent with what the Court recognized at the
 19 time it entered the original, July 19, 2007, scheduling order, it will likely take 12-15 months to
 20 complete discovery and motion practice. TIG therefore submits that a March, 2010 trial date
 21 would be appropriate.

22 **2. Amendment of Pleadings.** Given the PUD's notice of intent to bring an IFCA
 23 claim, TIG submits that the court should set a short date for amendment of pleadings so that,
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1 among other things, the non-retroactivity issue can be framed and squarely addressed at an
2 early stage of the proceedings.

3 **3. Discovery Schedule.** Judging by certain interrogatory answers already
4 provided by PUD and other articulations of its extra-contractual claims, PUD intends to make a
5 broad array of allegations relating to the entirety of TIG's pre-litigation investigation of the
6 dam failure, TIG's alleged litigation conduct, and the activities of TIG's original counsel,
7 Bullivant, Houser, Bailey, P.C.² The propriety of PUD's claims and its expansive discovery
8 into otherwise privileged matters is beyond the scope of the present filing. For now, it is
9 sufficient to say that the discovery process will be extensive and various discovery issues may
10 arise that will require the guidance of the Court. Moreover, given the nature of PUD's claims it
11 is likely that both sides will offer substantial expert testimony. TIG believes that, in order to
12 most efficiently conduct expert discovery, disclosure of expert reports should be staggered in a
13 manner so that TIG is able to respond to the PUD's experts prior to the depositions of its
14 experts.

15 **4. LR 39.1 Compliance.** There have been several attempts at mediated and direct
16 resolution of the claims in this case. Because these were unsuccessful, TIG believes that
17 further efforts under LR 39.1 should await the completion of discovery and perhaps the
18 resolution of certain motions.

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24 ² The Bullivant firm is withdrawing as counsel and the Bennett Bigelow firm is appearing for purposes of the
litigation going forward.

IV. CONCLUSION

TIG agrees that it is appropriate to lift the stay on litigation of PUD's extra-contractual claims, but submits that the Court should not issue a scheduling order in a vacuum. It should, prior to lifting the stay, enter an Order requiring the parties to confer and submit a joint status report that addresses the issues outlined above.

DATED this 24th day of November, 2008.

BENNETT BIGELOW & LEEDOM, P.S.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 24th day of November 2008, I caused to be served Counterclaim Defendant TIG's Response to Counterclaim Plaintiff PUD's Motion to Lift the Stay of the PUD's Extra Contractual Claims to:

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via hand delivery
via first class mail
via facsimile
via ECF

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via hand delivery
via first class mail
via facsimile
via ECF

I declare under penalty of perjury this 24th day of November 2008, at Seattle, Washington.

By /s/ Timothy E. Allen
Timothy E. Allen

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